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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

No. 12-IIB04

March 27, 2012

REQUESTED BY:

Margaret M. McKay, Chair
Open Government
League of Women Voters of Delaware

and

John Flaherty, President
Delaware Coalition for Open Government

OPINION BY:

Kent Walker, Deputy Attorney General
Delaware Department of Justice

and

Lawrence W. Lewis, State Solicitor
Delaware Department of Justice

OPINION

We received from you on December 12, 2011 a complaint against the Caesar Rodney School District ("the District") alleging certain violations of the Freedom of Information Act ("FOIA"), 29 *Del. C.* Ch. 100. Pursuant to 29 *Del. C.* § 10005 (e), we treat your complaint as a petition ("Petition") to the Attorney General to determine whether a violation of FOIA has occurred. By letter on February 20, 2012, we referred

the Petition to David H. Williams, Esquire, legal counsel to the Board of Education of the District (the "Board") for the District's response.

By letter dated March 7, 2012 from Mr. Williams, the District responded to the Petition.

THE PETITION

The Petition alleges four specific violations of FOIA by the District:

1. Failure of the Board to provide an adequate Agenda for its Regular and Special Meetings by posting only "Tentative Agendas" for its meetings.
2. Failure of the Board to inform the public in its agenda that it was planning to increase salaries of administrators and teachers during its December 20, 2011 meeting and by failing to announce that the Board would be voting on the budget for the 2012 fiscal year that included teachers' salaries raises.
3. Failure of the Board to include in its agenda the specific ground or grounds for executive sessions it proposes to hold.
4. Failure of the Board to provide adequate Board Minutes, including salary increases adopted at the December 20, 2011 Board meeting.

ANALYSIS

1. We find that the Board violates FOIA by not disclosing "agendas" for its meetings. FOIA, 29 *Del. C.* § 10004(e)(2) requires that: "All public bodies [including school boards] shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least seven (7) days in advance thereof. The notice shall include the agenda . . ." We agree with the petitioners that posting only "Tentative Agendas" does not meet the statutory requirements. As this office has repeatedly observed: "An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, and so that members of the public can decide whether to attend the meeting and voice their ideas or

concerns.” Att’y Gen. Op. 03-IB22 (Oct. 6, 2003) (*quoting* Att’y Gen. Op. 97-IB20 (Oct. 20, 1997)). While it is true, as the Board observes, that a posted meeting agenda may be revised and items added, that may be done only under narrow statutory circumstances. And while it is also true that FOIA does not prohibit the term “tentative,” we find that its use implies that the “tentative agenda” *will* be revised and misleads the public to believe that a non-tentative agenda will be posted later, when that is unlikely to happen. The Board has agreed to drop the use of the term “tentative.”

2. We find that the Board did not violate FOIA by failing to disclose in its agenda for its December 20, 2011 meeting that the board was planning to increase salaries of administrators and teachers. The Board has provided us with copies of its collective bargaining agreement with the Caesar Rodney Education Association and evidence that it was properly adopted by the Board at its June, 2011 meeting. The salary increases for which this agreement provides are reflected in the budget adopted by the Board at its December 20, 2011 meeting.

Likewise, the Board has given us a copy of its “Administrators’ Meet & Confer Agreement” that provides for certain compensation increases for District administrators, which increases are also reflected in the budget adopted at the December 20, 2011 meeting. This agreement also appears to have been properly adopted by the Board.

3. We agree with the Petitioners that the Board violates FOIA when its agendas fail to specify the specific grounds for holding proposed executive sessions. 29 *Del. C.* § 10002(a) requires that Board’s meeting agendas include “a statement of intent to hold an executive session and the specific ground or grounds therefor . . .” Lest there be any doubt of this requirement, § 10004(c) also requires that “[t]he purpose of such executive

sessions shall be set forth in the agenda . . .” The agendas for the Board’s meetings, prior to the meeting on January 17, 2012, give no indication of the “specific ground or grounds” for the anticipated executive sessions. The Board has agreed to post specific grounds for executive sessions in the future and it did so in its agenda for the January 17, 2012 meeting.

4. We find that the Board did not violate FOIA by failing to provide adequate Board Minutes, including salary increases adopted at the December 20, 2011 board meeting. As we observed in Paragraph 2, above, the compensation increases for teachers and administrators were made pursuant to existing, binding contracts. Hence, there was no need for the Board to approve what it has already approved. The minutes of the December 20, 2011 meeting, page 7, item D.2., clearly show the adoption of the District’s operating budget by a unanimous vote of the Board members present.

Moreover, although the minutes do not “include a record, by individual members . . . of each vote taken and action agreed upon” as 29 *Del. C.* § 10004(f) specifies, having recorded the call of the roll of Board members and announced a unanimous decision in accord with 14 *Del. C.* § 1048(d), we conclude that FOIA’s minutes requirements were met.

CONCLUSION

We are satisfied that the Caesar Rodney School Board in future will post its Agendas as required by FOIA and will specify in those Agendas the specific grounds for any proposed executive sessions. And we have concluded that approval of the Fiscal Year Operating Budget was properly listed in the Agenda for the December 21, 2012, and duly

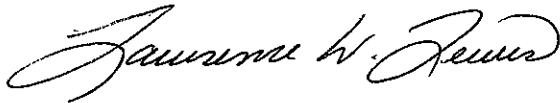
adopted, and that compensation increases for teachers and district administrators had previously been duly approved and required no further action.

Very truly yours,

A handwritten signature in black ink that reads "Kent Walker". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Kent Walker
Deputy Attorney General

Approved:

A handwritten signature in black ink that reads "Lawrence W. Lewis". The signature is cursive and somewhat stylized, with the first letters of the first and last names being capitalized and prominent.

Lawrence W. Lewis
State Solicitor

cc: Charles E. Butler, Chief Deputy Attorney General
David H. Williams, Esquire
Kevin Fitzgerald, Ed.D
David Perrington